It will improve neither the caliber nor the administrative efficiency of these tribunals to confine them to the crystallized and archaic methods of the common law. Men of power, insight, and wide experience can be secured upon a commission only if it is clothed with large discretion and given the means to make its own decisions reasonably effective; not, however, if it is to be a mere automaton for the application of unscientific legislative measures. Courts were foredoomed to failure in handling these complex questions because of their inelastic machinery. Administrative tribunals, now in their formative period, may come to similar grief, unless they are kept free from annoying restrictions of form and procedure.

THE EFFECT IN FEDERAL PRACTICE OF GIVING A CRIMINAL DEFENDANT NOTICE TO PRODUCE DOCUMENTS IN HIS POSSESSION. — That over-careful regard for the rights of the criminal defendant,[1] which is still occasionally noticeable in the reports, seems lately to have been responsible for some unfortunate reasoning in the federal courts. In a recent case the Circuit Court of Appeals for the Seventh Circuit held that it was error, though not prejudicial in the particular case, for the trial court to allow the prosecuting attorney to read before the jury a notice to the defendant to produce certain letters which he had in his possession. *Hanish* v. *United States* (not yet reported).[2] This *dictum* is in accord with *McKnight* v. *United States*,[3] an earlier case in the Sixth Circuit, in which the presentation of notice was given as a ground for reversing judgment. The ruling seems to be based on the ground that to allow such notice would permit inferences to be drawn which would be a violation of the defendant's constitutional right of immunity against self-incrimination.[4] By statute in almost every state and by the federal law, unfavorable inferences may not be drawn from the accused's failure to testify,[5] but by the weight of authority the jury is permitted to take into account the criminal defendant's failure to produce witnesses, or, so the cases seem to decide, documents not of his own authorship.[6]

It would seem, however, erroneous to bring notice to produce within

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[1] See BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Book IX, pt. IV, c. III.

[2] For a full statement of this case, see RECENT CASES, p. 223.

[3] 115 Fed. 972, 976.

[4] The Fifth Amendment of the federal Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. This has been held to apply only to the federal courts. Twining *v.* New Jersey, 211 U. S. 78, 93. The states, either by constitution or statute, have adopted similar provisions. See, for instance, IOWA CODE, § 5484.

[5] U. S. COMP. STAT., § 1465; Wilson *v.* United States, 149 U. S. 60. See 3 WIGMORE, EVIDENCE, § 2272 and notes. Allowing inferences to be drawn has been held not to be a violation of the due process clause of the Fourteenth Amendment. Twining *v.* New Jersey, 211 U. S. 78, 99.

[6] Clifton *v.* United States, 4 How. (U. S.) 242, 247; People *v.* Cline, 83 Cal. 374, 378, 23 Pac. 391; United States *v.* Flemming, 18 Fed. 907, 916. See 3 WIGMORE, EVIDENCE, § 2273. But see State *v.* Hull, 18 R. I. 207, 211, 26 Atl. 191, 192. Although in the principal case one of the letters in question was written by the defendant, the court tried to distinguish the McKnight case where the document in question was "highly incriminating."

the rule applying to comment on a failure to testify. The rule of law is that if a party to a suit wishes to prove a writing he must either bring it into court, or show why it is not feasible for him to do so.[7] Therefore, with certain important exceptions, a notice to the adversary to produce documents in his possession has always been held a necessary foundation for the introduction of secondary evidence.[8] If the adversary has destroyed the document or suppressed it either himself or in collusion with a third person, no notice is necessary, as his action amounts to a refusal to produce.[9] Also if notice is implied in the declaration or indictment, the rule is considered to have been complied with.[10] But in such cases if formal notice were given such surplusage would naturally not be considered error. The court in the McKnight case, however, utterly overlooks the reason for the rule, in concluding that, as the notice to produce is a comment on the defendant's claim of privilege, or at least would give ground for inferences to be drawn against him, secondary evidence may be given without such notice. The fallacy in this argument lies in supposing that any comment can be made on, or inference drawn from, a claim of privilege before the claim is made. There can be no claim of privilege until the notice is given. Moreover, the refusal to produce on notice is not necessarily a claim of privilege, as the party with papers in his possession may refuse to produce for other reasons.[11] It is furthermore difficult to see wherein a notice to produce and consequent refusal gives any more basis for inferences than proof that documents which have not been produced are in the defendant's hands. Yet that such proof must be made before introducing secondary evidence is universally admitted.[12]

From a practical point of view the decision in the McKnight case is a pitfall for an unwary prosecutor. If the trial judge admits secondary evidence without requiring notice he may well be reversed above by a court which knows only the common-law rule.[13] On the other hand if the prosecution is required to give notice, the exotic rule of the McKnight case may be applied. On either hypothesis the defendant can except with a good chance of being sustained. The only safe way of proceeding is to have the jury sent out or to present the notice before

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[7] See Queen *v.* Inhabitants of Kenilworth, 7 Q. B. 642. Also for a full discussion of the rule, see 2 WIGMORE, EVIDENCE, §§ 1178–1250.

[8] Young *v.* People, 221 Ill. 51, 56, 77 N. E. 536, 538; Snider *v.* State, 78 Miss. 366, 29 So. 78; Doe d. Phillips *v.* Morris, 3 A. & E. 46, 50; 2 WIGMORE, EVIDENCE, § 1202.

[9] Leeds *v.* Cook, 4 Esp. 256; Doe d. Pearson *v.* Ries, 7 Bing. 724; Gray *v.* Pentland, 2 S. & R. (Pa.) 23, 31; Nealley *v.* Greenough, 25 N. H. 325, 330. See 2 WIGMORE, EVIDENCE, § 1207.

[10] McGinnis *v.* State, 24 Ind. 500; United States *v.* Doebler, Baldw. 519; State *v.* Mayberry, 48 Me. 218, 238; People *v.* Rial, 23 Cal. App. 713, 719, 139 Pac. 661, 663; United States *v.* Reyburn, 6 Pet. (U. S.) 352, 365.

[11] See 3 WIGMORE, EVIDENCE, § 2273, n. 3.

[12] "The introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession ot the defendant." Day, J., in McKnight *v.* United States, 115 Fed. 972, 980.

[13] In Dunbar *v.* United States, 156 U. S. 185, 195, defendant's counsel objected because he had no notice, whereupon notice was given to him in open court. There was no objection raised or discussed as to comment on failure to testify, although the writings in question were of the defendant's own authorship. See also cases cited in the following footnote.

the judge in chambers. It might be argued that there is no great objection to pursuing this method. There is, however, a measure of inconvenience involved. Furthermore, the need of breaking off in the middle of presenting a case to the jury, in order to send them from the room, has the effect of taking their minds from the thread of the story, and thus rendering the evidence when presented far less telling than if it were allowed to come in without delay. An addition to the many technicalities of our criminal procedure, which is only necessary because of this mistaken decision,[14] is certainly to be deplored.

ARE PREFERENTIAL VOTING STATUTES UNCONSTITUTIONAL? — How nearly "effective voting" may be accomplished by means of legislation alone is a question upon which the authorities are in confusion. Two late conflicting decisions serve to increase the uncertainty in which the law here finds itself. In each case the plaintiff brought suit to contest the right of the defendant to an elective office. Under a constitution guaranteeing to all electors the right "to vote . . . for all officers that now are, or hereafter may be, elective by the people" the Supreme Court of Minnesota held that a statute providing for preferential voting was unconstitutional. *Brown* v. *Smallwood*, 153 N. W. 953. Upon the same facts and under a substantially similar constitutional provision the Supreme Court of New Jersey reached the opposite conclusion. *Orpen* v. *Watson*, 93 Atl. 853.

The right to vote is not a right inherent in any person but is a political privilege granted by the state to a specified class of electors and is subject to state control and regulation.[1] So the power of a state legislature to effectuate ballot reform is limited only by the negative provision of the Fifteenth Amendment to the federal Constitution [2] and the suffrage guarantees of the state constitution. The court must decide in each case what the constitution of the state does or does not guarantee to the electors.

In determining the power of the legislature to regulate the manner of exercising the elective franchise the courts, as a rule, have been liberal

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[14] McKnight *v.* United States, 115 Fed. 972, 976, probably stands alone. There is some talk in the books pointing toward an exception making notice unnecessary in the case of a criminal defendant where the writing has been clearly traced to his possession, but there is nothing to indicate that to allow such notice would be error. The ground on which the rulings are based is that the accused could not be compelled to produce and therefore notice is useless. Moore *v.* State, 130 Ga. 322, 333, 60 S. E. 544, 548; State *v.* McCauley, 17 Wash. 88, 91, 49 Pac. 221, 222; State *v.* Gurnee, 14 Kan. 111, 120. See 3 RICE, EVIDENCE, § 31; UNDERHILL, CRIMINAL EVIDENCE, 2 ed., § 42. Such reasoning results from a mistaken idea of the purpose of the rule. And the great weight of authority is that notice to produce is necessary as well in criminal as in civil cases. Regina *v.* Kitson, 6 Cox C. C. 159; Regina *v.* Elsworthy, 10 Cox C. C. 579; United States *v.* Winchester, 2 McLean (U. S.) 135; State *v.* Kimbrough, 2 Dev. Law (N. C.) 431; Young *v.* People, 221 Ill. 51, 56, 77 N. E. 536, 538; Snider *v.* State, 78 Miss. 366, 29 So. 78; State *v.* Martin, 229 Mo. 620, 635, 129 S. W. 881, 885; State *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613. See State *v.* Mann, 39 Wash. 144, 148, 81 Pac. 561, 562.

[1] See Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339.

[2] See United States *v.* Cruikshank, 92 U. S. 542, 555.